



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 13, 2004

Mr. Clark T. Askins
Assistant City Attorney
City of La Porte
P.O. Box 1218
La Porte, Texas 77572-1218

OR2004-3918

Dear Mr. Askins:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 201314.

The La Porte Police Department (the "department"), which you represent, received a request for the personnel files of four city police officers, "pending lawsuits, legal claims and settlements of lawsuits related to shootings" involving the four officers for a specified period of time, and investigations related to the shootings. You indicate that the department will release the personnel file of one of the officers, with information redacted under section 552.117 of the Government Code.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Before addressing your arguments for the submitted information, we note that some of the submitted documents appear to have been produced in response to grand jury subpoenas. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies that

¹See Open Records Decision No. 670 at 6 (2001) (authorizing all governmental bodies that are subject to chapter 552 of Government Code to withhold home addresses and telephone numbers, personal cellular telephone numbers, personal pager numbers, social security numbers, and family member information of peace officers without necessity of requesting attorney general decision under Gov't Code § 552.117(a)(2)); *see also* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (delineating circumstances under which attorney general decision constitutes previous determination under Gov't Code § 552.301).

are subject to chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.* Thus, to the extent that the information at issue is in the custody of the department as agent of the grand jury, it is not subject to disclosure under chapter 552. *Id.* at 4. However, to the extent that this information is not in the custody of the department as agent of the grand jury, it is subject to disclosure under chapter 552. In that event, we address your claims for this information, as well as for the remaining submitted information.

We note the submitted information includes a search warrant affidavit. The release of the affidavit is governed by article 18.01 of the Code of Criminal Procedure, which provides in part:

(b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. The affidavit is public information if executed, and the magistrate's clerk shall make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.

Crim. Proc. Code art. 18.01(b). Thus, when a search warrant has been executed, the supporting search warrant affidavit must be released under article 18.01(b). In this instance, the submitted affidavit relates to a search warrant that has been executed. Therefore, the search warrant affidavit that we have marked must be released in accordance with article 18.01(b) of the Code of Criminal Procedure. *See also* Open Records Decision No. 623 at 3 (1994) (exceptions to public disclosure under Gov't Code ch. 552 generally not applicable to information that another statute expressly makes public).

Next, we note that the submitted information includes the City of La Porte (the "city") charter. The charter is a matter of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"). Thus, the department may not withhold the charter under section 552.103 and must release this information to the requestor.

We further note that a portion of the information you submitted to this office as responsive to the request constitutes information that is subject to section 552.022 of the Government

Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. See Gov't Code §§ 552.022(a)(1) ("a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108"), 552.022(a)(17) ("information that is also contained in a public court record"). The completed evaluations may be withheld if they are confidential under other law or excepted from disclosure under section 552.108 of the Government Code.² The marked court documents may only be withheld if they are expressly confidential under other law. Section 552.103 is a discretionary exception and is not "other law" for the purpose of section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (section 552.103 may be waived); Open Records Decision No. 663 (1999) (governmental body may waive section 552.103); see also 522 at 4 (1989) (discretionary exceptions generally). Thus, the department may not withhold the completed evaluations or the court documents under section 552.103. We note, however, that one of the completed evaluations contains information that may be protected under common-law privacy and therefore excepted from disclosure under section 552.101 of the Government Code. Thus, we will determine if that information is confidential. The remaining evaluations and the marked court documents must be released to the requestor.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law privacy. The common-law right of privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Foundation v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683; see also, Open Records Decision Nos. 470 (concluding that fact that a person broke out in hives as a result of severe emotional distress is excepted by common-law privacy), 455 (1987) (concluding that kinds of prescription drugs a person is taking are protected by common-law privacy), 422 (1984) (concluding that details of self-inflicted injuries are presumed protected by common-law privacy), 343 (1982) (concluding that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress is protected by common-law privacy).

Having reviewed the information at issue, we find that a portion of it is protected by common-law privacy and must be withheld under section 552.101 on that basis. We have

²You do not claim section 552.108 as an exception to disclosure.

marked the information in the completed evaluation that must be withheld under section 552.101 in conjunction with common-law privacy. The remainder of the evaluation must be released to the requestor.

Section 552.101 also encompasses information protected by other statutes, such as section 143.089 of the Local Government Code. We understand that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that a city's civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g).

In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a).³ *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under chapter 552 of the Government Code. *See id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990).

However, a document relating to a police officer's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information that reasonably relates to a police officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You inform us that some of the submitted information is maintained by the department for its internal use. You inform us that this information concerns investigations into allegations of misconduct by the named police officers and that the investigations did not result in any disciplinary actions taken by the department against any of the named officers. Based on your representations and our review of the documents at issue, we agree that this information must be maintained in the department's internal file pursuant to section 143.089(g). *See*

³Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055.

Local Gov't Code §§ 143.051-.055. Therefore, this information is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code. We have marked the information accordingly.

Finally, we address your section 552.103 claim for the remaining submitted information. Section 552.103 of the Government Code provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body receives the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us, and provide documentation showing, that litigation involving the city is currently pending in the United States District Court for the Southern District of Texas, Galveston Division, under cause number H-04-CV-00102. You further indicate that litigation was pending when the department received the present request. You inform us that the pending litigation concerns allegations of wrongful injury and death as well as issues regarding the use of lethal force by the named officers, the officers' training, and departmental procedures, and explain that the information at issue is directly related to the pending litigation. However, the department is not a party to the pending litigation. See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the submitted information withheld from disclosure under section 552.103. You inform us that the Office of the City Attorney

represents the legal interests of both the city and the department. You state that release of the information at issue will jeopardize the city's position in litigation. Therefore, after review of your arguments and the requested information, we conclude that the information you seek to withhold relates to the pending litigation.

We note, however, that the opposing parties in the anticipated litigation have already seen or had access to some of the information that would otherwise be protected by section 552.103. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has already seen or had access to information relating to anticipated litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, you may not withhold information that the opposing parties already have seen or to which they have already had access under section 552.103. Otherwise, the remaining submitted information is excepted from disclosure at this time under section 552.103. We note that the applicability of section 552.103 to that information ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, to the extent that the information at issue is in the custody of the department as agent of the grand jury, it is not subject to disclosure under chapter 552. To the extent that the information at issue is not in the custody of the department as agent of the grand jury, we conclude the following: (1) the search warrant affidavit that we have marked must be released in accordance with article 18.01(b) of the Code of Criminal Procedure; (2) the marked information in one of the completed evaluations must be withheld under section 552.101 in conjunction with common-law privacy; (3) the remaining evaluations and the marked court documents must be released to the requestor pursuant to section 552.022; (4) the information that we have marked is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code; (5) information that the opposing parties in the pending litigation already have seen or to which they have already had access under section 552.103 must be released; and (6) the remaining submitted information is excepted from disclosure at this time under section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 201314

Enc. Submitted documents

c: Ms. Roma Khanna
Houston Chronicle
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(w/o enclosures)